



**Mwosha v Desbro Enginnering Ltd (Miscellaneous Case E170 of 2023)
[2025] KEELRC 216 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 216 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E170 OF 2023
DKN MARETE, J
JANUARY 29, 2025**

BETWEEN

RASHID KARIUKI MWOSHA APPLICANT

AND

DESBRO ENGINNERING LTD RESPONDENT

RULING

1. This is an application dated 2nd April, 2024 seeking the following orders of court.
 1. That this application be certified urgent and service thereof be dispensed with.
 2. That the Honourable Court be pleased to grant leave to the Applicant to be heard during the current High Court Vacation.
 3. That the Honourable Court be pleased to grant leave to the firm of Chesikaw & Kiprop Advocates to come on record for the Respondent, Desbro Engineering Limited, after Judgment.
 4. That pending the hearing and determination of this Application, the Honourable Court be pleased to stay the execution of the Decree issued on 23rd October 2023, pursuant to the Judgment delivered on 17th October, 2023 and all consequential orders.
 5. That pending the hearing and determination of this Application, an order does issue compelling the Claimant's/Respondent's agents, Daystar Auctioneers to forthwith release to the Applicant, the motor vehicle registration numberKxx 1x8X currently held at Valley Auctioneers Storage Yard.
 6. That the Honourable Court be pleased to issue summons to one Peter Sema Mutunga, a process server for purposes of examination on the contents of his Affidavits of service sworn on 13th October, 2023.



7. That the Honourable Court be pleased to review and set aside the Judgment delivered on 17th October 2023 by the Honourable Justice D. K. Njagi Marete and all consequential orders.
 8. That upon grant of prayer (6) above, the Honourable Court be pleased to grant leave to the Applicant to file a response to the Claimant's Application dated 21st August 2023.
 9. That costs of this application be awarded to the Applicant.
2. The issue in contention is that by an Affidavit of Service sworn on 13th October, 2023 by one, Peter Sema Mutunga, where he alleges at paragraph 4 and 6 that he had effected service on the Claimant. This is as follows;
6. Further, the Applicant's counsel came across an Affidavit of Service sworn on 13th October 2023 by one Peter Sema Mutunga, in which he alleges at paragraphs 4 and 6, to have effected service upon the Applicant by tendering the Claimant's Notice of Motion Application dated 21st August 2023 and the Hearing Notice dated 12th October 2023 to an unidentified secretary of the Applicant, at the reception of the Applicant.
3. It is the applicant's contention that the alleged Notice of Motion application on 2nd October, 2023 and hearing notice on 13th October, 2023 was improper and unlawful as the said court documents were never served upon the applicant by the said pleadings to a unidentified secretary of the applicant at the reception of the applicant. These were never served upon a secretary, director or other principal officer of the applicant as provided under Order 5 rule 3 of the [Civil Procedure Rules, 2010](#).
 4. The applicant further contends that whereas the process server claims to have served these documents on the secretary of the applicant at the reception, the deponent does not describe the alleged secretary or even provide his or her name as required of order 5 rule 15 of the [Civil Procedure Rule, 2010](#). A call for leave of court to cross examine the said process server is therefore sought.
 5. Other issues coming out of such service of process is as follows; That the applicant is a body corporate with a stamp in its name and any duly served document would be stamped and signed by the person duly authorised to receive service on behalf of the company. The allegation of refusal to sign is therefore misleading and falsified and an after effect of perjury intended to create an impression of proper service on his part. The allegation of the gate pass is also falsified these having been estopped at the onset of the Covid 19 pandemic. No Notice of Taxation was ever served and therefore the applicant was condemned unheard. All this exposed the applicants to harassment by auctioneers through attachment of assets obtained from an unprocedural and gravely faulty process. The Applicant was not served with proceeding before the county Occupational Safety and Health Officer in Claim Ref No. WIBA/NBI/0004/2022 and will seek to have award by the County Occupational Safety and health officer set aside to give it an opportunity to be heard. Attachment of the applicant's motor vehicle is unlawful and irregular in that there has not been a proclamation before such attachment.
 6. The Respondent in a Replying Affidavit sworn on 10th April, 2024 avers that he is aware that the Respondent has made a payment of Kshs.100,000.00 to the auctioneers towards a settlement of the decretal sum and therefore cannot accept or deny liability at the same time.
 7. Again, the Respondent has the following in support of his case; That the circumstances to which they made the payment which I am advised my counsel was based on the fact that after the Easter Holidays the Respondent would pay the full amount. That the Respondent has no defence on merit based on the fact that its statutory period of challenging the award by the DOSH as according to the [WIBA Act](#) has lapsed. Claimant submits that having part paid Kshs.100,000.00 in settlement of the decretal



amount and agreed to pay all other balances by end of the Easter holidays, he cannot seek to defend the case. He have been admitted liability.

8. It is the Claimant's penultimate submission that it would be an abuse of process of court for the Respondent to partially settle the decretal amount and thereafter come back to court and seek to set aside a judgment he has already made payments towards settlement. This would erode confidence in the administration of justice and malign the reputation of courts as arbiters of justice. What would result in the event of the matter is re-opened and the Claimant loses the suit?
9. The circumstances of this case dictate a findings in favour of the Claimant/Respondent. The Respondent/Applicant's case is overwhelmed by that of the Respondent. The issue of non-service does not come out clearly in evidence. On a balance of probability, the Claimant/Respondent's case overwhelmed that of the Applicant.
10. Secondly, the issue of concession by the Respondent's part payment of the decretal amount is not explained, or at all.
11. I am therefore inclined to partially allow the application in so far as representation is concerned but disallow the balance of application for want of merit. I therefore order as follows;
 - i. That leave be and is hereby issued to the firm of Chesikaw & Kiprop Advocates to come on record for the Respondent.
 - ii. That the issue of release of the Respondent's motor vehicle registration number Kxx 1x8X is spent, the same having been addressed and resolved in earlier proceeding of this court.
 - iii. That the balance of application be and hereby dismissed with costs to the Claimant/Respondent.

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF JANUARY 2025

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr. Amwama holding brief for Kiprop instructed by Chesikaw and Kiprop Advocates for the Respondent/Applicant.
2. Mr. Mwariri instructed by Kituo Cha Sheria for Claimant/Respondent.

